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Opinion on remand from Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ROBERT ANTONIO RAMIREZ, Defendant and Appellant.	B265610 (Los Angeles County Super. Ct. No. VA130983)

APPEAL from a judgment of the Superior Court of Los Angeles County, Olivia Rosales, Judge. Remanded with instructions.

Jerome McGuire, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra and Kamala D. Harris, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Idan Ivri, Michael C.

Keller, Zee Rodriguez, and Russell A. Lehman, Deputy Attorneys General; Max Carter-Oberstone, Associate Deputy Solicitor General, for Plaintiff and Respondent.

Applying the natural and probable consequences doctrine, a jury convicted Robert Antonio Ramirez of two counts of attempted premeditated murder, two counts of assault with a firearm and one count of shooting at an inhabited dwelling and found true special criminal street gang and firearm-use enhancement allegations. In a nonpublished opinion filed in September 2017 we affirmed the judgment, rejecting Ramirez's contentions his convictions should be reversed because the natural and probable consequences doctrine was inapplicable to this case, where the noncharged target offense was disturbing the peace; the gang expert's opinion was based on inadmissible testimonial hearsay; and there was insufficient evidence to support the jury's finding the charged nontarget offenses were committed for the benefit of a criminal street gang.

Ramirez's petition for review was granted by the Supreme Court in January 2018, but further action was deferred pending consideration of a related issue in *People v. Mateo* (review granted May 11, 2016, S232674; transferred to court of appeal March 13, 2019 [2019 Cal. Lexis 1638])—whether, to convict an aider and abettor of attempted premeditated murder under the natural and probable consequences doctrine, both premeditation and attempted murder must have been reasonably foreseeable by an individual committing the target offense.[1] Before that case was

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[1] The informal description of the question before the Court in *Mateo* read, "'In order to convict an aider and abettor of attempted willful, deliberate and premeditated murder under the natural

decided, the Legislature enacted Senate Bill No. 1437 (SB 1437) (2017-2018 Reg. Sess.) (Stats. 2018, ch. 1015), which "amend[ed] the felony murder rule and the natural and probable consequences doctrine, as it relates to murder." (*Id.*, § 1, subd. (f).) The Supreme Court then transferred this case to us with directions to vacate our decision and to reconsider it in light of SB 1437. (*People v. Ramirez* (Apr. 10, 2019, S245171) [2019 Cal. Lexis 2350].)

In *People v. Lopez* (2019) 38 Cal.App.5th 1087 (*Lopez*), which was also returned to this court by the Supreme Court with directions to reconsider our prior decision in light of SB1437, we considered and rejected appellants' arguments that, as a matter of either statutory construction or equal protection analysis, enactment of SB 1437 precludes convictions for attempted murder under the natural and probable consequences doctrine. The *Lopez* analysis applies equally to Ramirez's contention SB 1437 eliminates all aider and abettor liability under the natural and probable consequences doctrine, whatever the nontarget offense may be. Thus, SB 1437 has no effect on Ramirez's convictions for attempted murder, assault with a firearm and shooting at an inhabited dwelling, which we once again affirm.

Although we affirm Ramirez's convictions, we remand the matter to the trial court to consider whether to exercise its

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and probable consequences doctrine, must a premeditated attempt to murder have been a natural and probable consequence of the target offense? In other words, should *People v. Favor* (2012) 54 Cal.4th 868 be reconsidered in light of *Alleyne v. United States* (2013) [570 U.S. 99 [186 L.Ed.2d 314, 133 S.Ct. 2151]] and *People v. Chiu* (2014) 59 Cal.4th 155?'" (*People v. Gallardo* (2017) 18 Cal.App.5th 51, 85, fn. 17.)

discretion pursuant to Senate Bill No. 620 (2017-1018 Reg. Sess.) (Stats. 2017, ch. 682) (SB 620), which became effective January 1, 2018, to strike or dismiss the formerly mandatory firearm-use enhancements imposed as part of Ramirez's sentence under section 12022.53, subdivisions (c) and (e)(1), and pursuant to Senate Bill No. 1393 (2017-2018 Reg. Sess.) (Stats. 2018, ch. 1013) (SB 1393), effective January 1, 2019, to dismiss the formerly mandatory prior serious felony enhancement imposed under section 667, subdivision (a).

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Shooting*

In July 2013 Joe Gandara and his sister's boyfriend, Gilbert, stood outside a corner market in South Gate waiting for Gandara's brother, Steve Barraza, to leave the store.[2] Gilbert belonged to the Grape Street Watts gang and had prominent gang tattoos. While they were waiting, Ramirez, a member of the Lynwood Young Crowd gang who also had prominent gang tattoos, rode his bicycle toward Gandara and Gilbert, staring at them, and then rode back to an apartment complex on the corner across from the market. After Ramirez left, Gilbert told Gandara that Ramirez had previously approached him, but nothing had come of it.

Ramirez returned on his bicycle several seconds later and rode up the sidewalk within three to four feet of Gandara and Gilbert. Ramirez appeared calm and asked, "Where you guys from?" Gandara, who was not a member of a gang, understood

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[2] Gandara is the only one of the three victims to testify. Gilbert (Gandara did not know his last name) and Barraza were never located by the police.

Ramirez was asking what gang they were from and said nothing. Gilbert answered he was from Grape Street Watts. Ramirez, who had the letters Y and C tattooed on his face, said, "This is Lynwood Young Crowd" or, perhaps, "I am Lynwood Young Crowd." Gandara and Gilbert answered, "OK," and Ramirez returned to the apartment complex.[3]

At this point Barraza came out of the market; and Gandara, Barraza and Gilbert began walking down the block to their house, which was five lots from the corner. Gandara told Barraza "some guy" had just "hit [them] up." Barraza, a member of the South Side Lynwood gang, told him not to worry about it. Looking back at the apartment complex as they passed, Gandara saw Ramirez on his bike and three men standing next to the building, one with his hand tucked inside his waistband. That man began running toward Gandara, Barraza and Gilbert and yelled, "Hey, fuck Fake Street" (a derogatory name for Grape Street). Barraza said, "He's got a gun. Hurry up. Let's go." Gandara, who had a bike, began pedaling harder. Barraza and Gilbert ran. As they fled, Gandara saw the man with the gun running after them, followed by one of the other two men. Ramirez, still on his bike, was slowly following the man with the gun, who was never identified, and a man later identified as Ramirez's brother, Andres, down the street. Gandara never saw Ramirez talk or gesture to the man with the gun.

Gandara followed Barraza and Gilbert into their driveway toward the rear building where they lived. As Gilbert ran up the

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[3] At the preliminary hearing Gandara stated he had not been concerned after the exchange with Ramirez because "it was like a friendly-type encounter."

stairs to their apartment, Gandara again looked back and saw Ramirez was still "way back" toward the market, weaving back and forth on his bike. The man with the gun, who had reached the driveway, shot twice from the street toward the rear building. No one was struck. Abandoning his bike, Gandara climbed onto a neighbor's roof. He saw Andres standing across the street from the driveway. He did not see Ramirez after the shots were fired.

2. *The Investigation*

Responding South Gate police officers recovered a bullet fragment on the driveway next to the wall of the rear structure, located a bullet impact mark on the wall of the structure above the fragment and found two expended cartridge casings in the front yard adjacent to the street. At the apartment complex officers found Ramirez's brother, Andres, an Elm Street Watts gang member, and Efrain Parra, a Willow Street gang member, as well as a black BMX bike, in an apartment rented to Ramirez's mother. Later, Ramirez and his mother arrived in her car and parked in the complex carport. In the carport near Ramirez's mother's car a detective found two semiautomatic handguns wrapped in a rag. Four live rounds and two expended shell casings were recovered from the handguns. Forensic examination confirmed the cartridge casings and bullet fragments recovered from the shooting scene had been fired by one of the guns found in the carport.

In a field show-up Gandara identified Andres Ramirez and Parra as the men who had watched the shooter and the bike found in the Ramirez apartment as the one ridden by Ramirez. Later that day Gandara identified Ramirez in a photographic lineup as the one who had ridden the bike.

3. *The Information*

Ramirez was charged with two counts of attempted willful, deliberate and premeditated murder (Pen. Code, §§ 664, 187, subd. (a))[4] (counts 1 and 2); two counts of assault with a firearm (§ 245, subd. (a)) (counts 3 and 4); and one count of shooting at an inhabited dwelling (§ 246) (count 5). As to all counts the information alleged the crimes had been committed for the benefit of a criminal street gang (§ 186.22, subds. (b)(1)(B) & (C), (b)(4)).[5] As to counts 1, 2 and 5 the information alleged a principal had personally used and intentionally discharged a firearm (§ 12022.53, subds. (c), (e)(1)). The information further alleged Ramirez had suffered a prior conviction for a serious or violent felony within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12) and a serious felony conviction under section 667, subdivision (a)(1), and had served two prior prison terms for felonies within the meaning of section 667.5, subdivision (b).

Ramirez pleaded not guilty and denied the special allegations.

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[4] Statutory references are to this code unless otherwise stated.

[5] For simplicity this opinion on occasion uses the shorthand phrase "to benefit a criminal street gang" to refer to crimes that, in the statutory language, are committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (§ 186.22, subd. (b)(1); see *People v. Jones* (2009) 47 Cal.4th 566, 571, fn. 2.)

4. *The People's Gang Evidence*

The People presented evidence from two gang experts. South Gate Police Detective Christian Perez, an investigator with six years of experience investigating gang-related crimes in South Gate, had previous contact with Ramirez, who had admitted to Perez he was a member of the Lynwood Young Crowd gang with a moniker of "Snoops." Perez testified the area near the corner market was claimed by numerous gangs, including the Bad Ass Youngsters, South Side Players and Florencia. Without identifying members of the gang other than Ramirez, Perez stated members of Lynwood Young Crowd who lived in the area claimed the area as their territory. Gang members claim territory by "hitting up" other gang members in the area, that is, asking where others are from; stating where the gang member is from; assaulting other gang members with fists, weapons or guns; or tagging the area with graffiti. Gang members try to instill fear and intimidation in residents of the community and in rival gang members to establish respect for themselves and their gangs.

Los Angeles County Sheriff's Detective Marc Boisvert, assigned to the Sheriff's gang investigation unit, testified he had once patrolled Lynwood and was familiar with the Lynwood Young Crowd gang, which claims territory bounded by Imperial Highway to the north, Atlantic Avenue to the west, the 105 Freeway to the south and the 710 Freeway to the east. South Gate, and specifically the corner market, was not in territory traditionally claimed by Lynwood Young Crowd. That gang's principal rivals were South Side Lynwood, South Side Gangsters, Lynwood Neighborhood Crips and Lynwood 211 Crips. According to Boisvert, it was not uncommon for family members to belong to different—even rival—gangs and to assist one

another in committing crimes. The primary activities of the Lynwood Young Crowd gang include felony vandalism, shootings, assaults, drug sales, weapons possession and murder.

Although Detective Boisvert did not personally know Ramirez and had no experience with South Gate gangs, his research (including conversations with other officers) revealed Ramirez was an active member of Lynwood Young Crowd. Boisvert also testified that the question "Where are you from?" is a challenge that usually leads to a violent altercation, especially when the gang member questioned claims his gang. If a gang member issuing such a challenge was outnumbered, he might wait until he had the support of others to initiate violence. If a gang member lives in territory claimed by other gangs, he would still be expected to represent his gang and make his name and the gang's name known in the area. In gang culture disrespect leads to violence. "Fake Street" is a derogatory term for the Grape Street gang.

Detective Boisvert testified about two predicate convictions involving Lynwood Young Crowd gang members who were each found guilty of second degree murder with the specific intent to benefit their gang. Given a hypothetical based on the evidence presented against Ramirez, Boisvert opined the shooting had been committed on behalf of a criminal street gang: A gang member had hit up the victims and claimed his own gang; the crime was committed in association with a criminal street gang because the gang member was assisted by other individuals, one of whom yelled a derogatory reference to the gang claimed by one of the victims; and instilling fear benefits the gang, in this case, Lynwood Young Crowd.

5. *The Defense Evidence*

Ramirez did not testify at trial. Martin Flores, the director of a center providing services to at-risk youth and a member of the Los Angeles County Superior Court gang expert panel, testified on behalf of the defense. Flores had worked in Watts for many years and knew South Gate well. Flores testified gangs are very oriented to their boundaries and the major gangs in the portion of South Gate where the shooting took place were Bay Ardmore Youngsters Trece, Southside Players, Garden View, Willow Street, Kansas Street and Florencia. Elm Street, a Watts gang, overflowed past the west boundary of South Gate. Flores agreed with Detective Boisvert's description of Lynwood Young Crowd's territory and confirmed that the gang's territory was far from the area of the incident. He also opined a gang member who moves into another gang's territory must "respect that neighborhood," then "you have a pass . . . to go from your house to . . . the bus stop, the market" and "other places in the neighborhood." A gang member claiming the area around the corner market for Lynwood Young Crowd would be "looking for trouble."

Considering the same hypothetical posed to Detective Boisvert, Flores believed it would be important to know the gang affiliation of the shooter, as well as those of the other men who participated in the incident, to understand whether the crime benefited Lynwood Young Crowd. Although he acknowledged gang members from different gangs do commit crimes together, he "disagree[d] that those crimes are done on behalf of a hood." In light of the participants' differing gang affiliations, Flores opined the shooting did not have to do with a particular gang; instead, "very likely" the shooting was "a personal response" tied to the

shooter's rivalry with Grape Street Watts. Lynwood Young Crowd and Grape Street are not rivals.

Flores also disagreed with Detective Boisvert's assertion that any time a gang member hits someone up, violence is likely to result. In Flores's experience many such encounters do not result in violence and are simply inquiries, particularly when a gang member moves into a new area.

6. *Jury Instructions and Verdict*

The jury was instructed with CALCRIM No. 400, advising it a person is guilty of a crime whether he or she "committed it personally or aided and abetted the perpetrator," and CALCRIM No. 401, defining the elements for finding the defendant guilty of a crime based on aiding and abetting that crime. Over Ramirez's objection that there was insufficient evidence for the jury to find Ramirez had committed the uncharged (target) crime of disturbing the peace in violation of section 415 by challenging someone to a fight, the court instructed the jury pursuant to CALCRIM No. 403 that, "[b]efore you may decide whether the defendant is guilty of attempted murder and/or assault with a firearm and/or shooting at an inhabited dwelling, you must decide whether he is guilty of disturbing the peace." If Ramirez is guilty of disturbing the peace (the target offense), the court continued, he may be found guilty of attempted murder and/or assault with a firearm and/or shooting at an inhabited dwelling (the nontarget offenses) if the People proved that, during the commission of the target offense, a "coparticipant" in the target offense committed one or more of the nontarget offenses and "[u]nder all the circumstances, a reasonable person in the defendant's position would have known that the commission of [one or more of those offenses] was a natural and probable consequence of the

commission of disturbing the peace."[6] The court defined "coparticipant" in the language of CALCRIM No. 403 as "the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander."

In closing argument the prosecutor read the jury excerpts from CALCRIM No. 403 and argued, relying on Detective Boisvert's testimony that a hit-up usually leads to gang violence, Ramirez's apparent communication with the shooter regarding Gilbert's affiliation with Grape Street Watts and the discovery of the handguns in the carport, that Ramirez and the shooter were coparticipants in unlawfully challenging Gandara and Gilbert to fight and that shooting at the three men was the natural and probable consequence of that uncharged offense.

The jury convicted Ramirez on all counts, found the attempted murders had been committed willfully, deliberately and with premeditation, and found true the special firearm-use and criminal street gang enhancement allegations. Ramirez waived trial and admitted the prior conviction and prison term allegations. Ramirez moved unsuccessfully for a new trial on the ground there was insufficient evidence to support a conviction for attempted murder as a natural and probable consequence of the offense of disturbing the peace.

The court sentenced Ramirez to an aggregate term of 14 years to life plus 25 years in state prison: An indeterminate term of 14 years to life on count 1 (seven years to life, doubled

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[6] The court separately instructed on the elements necessary to prove disturbing the peace (CALCRIM No. 2688), attempted murder (CALCRIM Nos. 600 & 601), assault with a firearm (CALCRIM No. 875) and shooting at an inhabited house (CALCRIM No. 965).

under the three strikes law), plus a consecutive 20-year term for the firearm-use enhancement, plus a consecutive five-year term for the prior serious felony conviction; a concurrent term of 14 years to life on count 2 (seven years to life, doubled under the three strikes law), plus a consecutive 20-year enhancement for the firearm use; and a concurrent determinate term of 14 years on count 5 (the upper term doubled under the three strikes law), plus a consecutive 20-year enhancement for the firearm use. The court stayed sentencing on counts 3 and 4 under section 654. The court also stayed sentence under section 667.5, subdivision (b), and imposed appropriate fees and costs.

DISCUSSION

1. *SB 1437 Applies Only to Accomplice Liability for Felony Murder and Murder Under the Natural and Probable Consequences Doctrine and Does Not Affect Ramirez's Convictions for Attempted Murder or Other Nonhomicide Offenses*

In *Lopez*, *supra*, 38 Cal.App.5th at page 1104 we held SB 1437 does not modify the law of attempted murder, explaining there was nothing ambiguous in the language of SB 1437, which, in addition to omitting any reference to attempted murder or any other nonhomicide, nontarget offense, expressly identifies its purpose as the need "to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).) We added that the Legislature's obvious intent to exclude crimes other than murder "is underscored by the language

of new section 1170.95, the provision it added to the Penal Code to permit individuals convicted before SB 1437's effective date to seek the benefits of the new law from the sentencing court. Section 1170.95, subdivision (a), authorizes only those individuals 'convicted of felony murder or murder under a natural and probable consequences doctrine' to petition for relief; and the petition must be directed to 'the petitioner's murder conviction.' Similarly, section 1170.95, subdivision (d)(1), authorizes the court to hold a hearing to determine whether to vacate 'the murder conviction.'" (*Lopez*, at p. 1105.) We concluded our statutory analysis by stating, "As a matter of statutory interpretation, SB 1437's legislative prohibition of vicarious liability for murder does not, either expressly or impliedly, require elimination of vicarious liability for attempted murder." (*Lopez*, at p. 1106; accord, *People v. Munoz* (Sept. 6, 2019, B283921) __ Cal.App.5th__ [2019 Cal.App. Lexis 843].) Ramirez's supplemental brief suggests no grounds warranting reconsideration of *Lopez*.

Lopez also rejected the argument the Legislature's decision to limit the reform of aider and abettor liability under the natural and probable consequences doctrine to instances where the nontarget offense is murder violates equal protection. We first held individuals convicted of murder and those convicted of attempted murder (or other nontarget offenses) under the natural and probable consequences doctrine are not similarly situated. (*Lopez*, *supra*, 38 Cal.App.5th at pp. 1107-1108.) Even if they were, we continued, the limitation of SB 1437 to individuals convicted of murder under the natural and probable consequences doctrine is subject to rational basis review (*id.* at p. 1110), and constitutionally adequate, plausible reasons exist for the Legislature's decision (*id.* at p. 1111). Again, nothing in Ramirez's

supplemental brief indicates the constitutional analysis in *Lopez* should be revisited.

2. *Ramirez's Convictions Under the Natural and Probable Consequences Doctrine Were Proper*

The jury was instructed it could convict Ramirez of attempted murder, assault with a firearm and shooting at an inhabited dwelling if he was guilty of the uncharged target offense of disturbing the peace, a coparticipant in that crime committed one or more of the charged offenses and those offenses were the natural and probable consequence of the target offense. Ramirez does not challenge the accuracy of the court's instructions independently of his SB 1437 argument, but contends the natural and probable consequences doctrine, even if it remains a valid basis for convicting aiders and abettors for offenses other than murder, did not apply under the circumstances of this case. (Cf. *People v. Guiton* (1993) 4 Cal.4th 1116, 1129 [error to give an instruction that, while correctly stating a principle of law, has no application to the evidence presented].)[7]

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[7] The court did not instruct the jury, and the prosecutor did not argue, that Ramirez could be found guilty of attempted murder, assault with a firearm or shooting at an inhabited dwelling as a direct aider and abettor or coconspirator of the shooter. Accordingly, Ramirez's challenge to the verdicts does not depend on evaluating whether the jury may have relied on a legally correct, factually supported alternate theory of guilt. (Compare *People v. Chiu* (2014) 59 Cal.4th 155, 167 ["[w]hen a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground"] with *People v. Thompson* (2010) 49 Cal.4th 79, 119 ["'[w]here the jury considers both a factually

Ramirez raises three distinct points. First, there was insufficient evidence to convict him of the target offense, disturbing the peace. Second, even if he was guilty of that offense, he was the sole perpetrator, not an aider and abettor or coparticipant within the scope of the natural and probable consequences doctrine. Third, the target offense was too trivial to support convictions for the serious felonies charged as the natural and probable consequence of that minor crime. None of Ramirez's arguments has merit.

a. *Governing law*

In *People v. Prettyman* (1996) 14 Cal.4th 248, 259-260 (*Prettyman*), the Supreme Court explained, "It sometimes happens that an accomplice assists or encourages a confederate to commit one crime, and the confederate commits another, more serious crime (the nontarget offense). Whether the accomplice may be held responsible for the nontarget offense turns not only upon a consideration of the general principles of accomplice liability set forth in *People v. Beeman* [(1984)] 35 Cal.3d 547, but also upon a consideration of the 'natural and probable consequences' doctrine . . . ."

Addressing the scope of the doctrine, the *Prettyman* Court held, "Under the 'natural and probable consequences' doctrine . . . , the jury must decide: whether the defendant (1) with knowledge of the confederate's unlawful purpose; and (2) with the intent of committing, encouraging, or facilitating the

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sufficient and a factually insufficient ground for conviction, and it cannot be determined on which ground the jury relied, we affirm the conviction unless there is an affirmative indication that the jury relied on the invalid ground'"].)

commission of any target crime(s); (3) aided, promoted, encouraged, or instigated the commission of the target crime(s). The jury must also determine whether (4) the defendant's confederate committed an offense *other than* the target crime(s); and whether (5) the offense committed by the confederate was a natural and probable consequence of the target crime(s) that the defendant encouraged or facilitated." (*Prettyman*, *supra*, 14 Cal.4th at p. 271; accord, *People v. Chiu* (2014) 59 Cal.4th 155, 158 (*Chiu*) ["'under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also "for any other offense that was a 'natural and probable consequence' of the crime aided and abetted,"'" quoting *People v. McCoy* (2001) 25 Cal.4th 1111, 1117; see § 31.)[8]

"A nontarget offense is a '"natural and probable consequence"' of the target offense if, judged objectively, the additional offense was reasonably foreseeable. [Citation.] The inquiry does not depend on whether the aider and abettor actually foresaw the nontarget offense. [Citation.] Rather, liability '"is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted."' [Citation.] Reasonable foreseeability 'is a factual issue to be resolved by the jury.'" (*Chiu, supra*, 59 Cal.4th at

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[8] Section 31 provides, "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission . . . are principals in any crime so committed."

pp. 161-162, quoting *People v. Medina* (2009) 46 Cal.4th 913, 920 (*Medina*).)

In *People v. Smith* (2014) 60 Cal.4th 603 (*Smith*) the Supreme Court, in disapproving a sentence in an earlier version of CALCRIM Nos. 402 and 403,[9] discussed the natural and probable consequences doctrine and, at least to a limited extent, seems to

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[9] At the time of Smith's trial CALCRIM Nos. 402, to be given when both the target and nontarget offenses were charged, and 403, to be given when only the nontarget offense was charged, instructed the jury, "If the [nontarget offense] was committed for a reason independent of the common plan to commit the [target offense], then the commission of [the nontarget offense] was not a natural and probable consequence of [the target offense]." The Supreme Court explained this language in the CALCRIM instruction—which was also included in the instruction given in the case at bar—"if correct, would mean that a nontarget offense, even if reasonably foreseeable, is not the natural and probable consequence of the target offense if the jury finds it was committed for a reason independent of the common plan to commit the target offense." (*Smith*, *supra*, 60 Cal.4th at pp. 613-614.) The Court noted the sentence was likely based on language appearing in cases involving conspirator liability (*id*. at p. 614) and held this limitation does not apply in cases in which the liability for a nontarget offense is based on the natural and probable consequences theory: "If the prosecution can prove the nontarget crime was a reasonably foreseeable consequence of the crime the defendant intentionally aided and abetted, it should not additionally have to prove the negative fact that the nontarget crime was not committed for a reason independent of the common plan." (*Id*. at p. 617.) Because the incorrect sentence was favorable to the defendant, however, including it in the instructions was necessarily harmless. (*Ibid*.) The current versions of CALCRIM Nos. 402 and 403, amended in February 2015 following *Smith*, omit the sentence.

have expanded its contours. The defendant in *Smith* was convicted of the murders of two of his fellow gang members—one a friend; the other his cousin—who were shot by members of a rival gang as the outgrowth of an incident in which the two rival gangs had cooperated in staging a "jump out"[10] and, in doing so, had aided and abetted each other in committing the target crimes of disturbing the peace and assault or battery. (*Smith*, at pp. 611-612.) As described by the Supreme Court, "The prosecutor had argued that during the commission of the target crimes, a principal in those crimes (a member of [the rival gang]) committed the murders, and the murders were the natural and probable consequence of the target crimes." (*Id.* at p. 612.)

The defendant argued that the natural and probable consequences doctrine had been misapplied in his case and that principals in the target crime may not be found guilty of nontarget crimes, even if those nontarget crimes are otherwise foreseeable, if they did not intend to aid and abet the perpetrator of the nontarget offenses. The Supreme Court rejected the argument, quoting with apparent approval the definition of "coparticipant" in CALCRIM No. 402—"'the perpetrator or anyone who aided and abetted the perpetrator'" (*Smith*, *supra*, 60 Cal.4th at p. 612)—and explained, "The statutes and, accordingly, the natural and probable consequence doctrine, do not distinguish among principals on the basis of whether they directly or indirectly aided and abetted the target crime, or whether they directly or indirectly aided and abetted the perpetrator of the nontarget

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[10] "'[I]n order to get out of a gang, a member must be "jumped out," which typically involves a beating of that member by the same members who jumped him or her into the gang.'" (*Smith*, *supra*, 60 Cal.4th at p. 608.)

crime." (*Id*. at p. 613.)[11] Affirming Smith's convictions, the Court noted his liability "was based on his being a principal [in the target offenses] under Penal Code section 31" (*ibid*.) and concluded the jury could have reasonably found that all the possible shooters had been aiders and abettors in the target offenses (disturbing the peace and assault), and therefore principals in those offenses, regardless of their gang affiliation. (*Id*. at p. 619.) Thus, at least in the context of gang violence, the Supreme Court appears to have sanctioned the use of the natural and probable consequences doctrine to impose liability on any principal (whether perpetrator or aider-or-abettor) in the target offense when another principal (whether perpetrator or aider-or-abettor) in that offense commits a reasonably foreseeable nontarget offense.

b. *Substantial evidence supports the jury's implied finding Ramirez committed the target offense of disturbing the peace*

The target offense identified by the court in instructing the jury with CALCRIM No. 403 was disturbing the peace, a violation of section 415, subdivision (1), which imposes misdemeanor liability on "[a]ny person who unlawfully fights in a public place or challenges another person in a public place to fight." As

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[11] In the court of appeal Smith had articulated this argument as limiting liability under the natural and probable consequences doctrine to reasonably foreseeable nontarget offenses committed by a "confederate," the term employed by the Supreme Court in *Prettyman*, *supra*, 14 Cal.4th at page 267. By using the word "coparticipant," CALCRIM Nos. 402 and 403 permit liability to be imposed on anyone, regardless of affiliation, who participates in a target offense as a direct perpetrator or aider and abettor.

discussed, Ramirez first rode his bicycle toward Gandara and Gilbert while staring at them. He returned shortly thereafter, rode close to them and asked, "Where you guys from?" When Gilbert answered he was from Grape Street Watts, Ramirez identified either the territory or himself as Lynwood Young Crowd. Ramirez asserts this evidence of his statements and conduct was insufficient to establish culpability for the target offense of disturbing the peace, thereby negating his liability under the natural and probable consequences doctrine for the nontarget offenses.[12] In support of his challenge to the sufficiency

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[12] In evaluating a claim for lack of substantial evidence, "we review the record 'in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Westerfield* (2019) 6 Cal.5th 632, 713.) "In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; accord, *People v. Penunuri* (2018) 5 Cal.5th 126, 142.) "'Where the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled

of the evidence, Ramirez cites Gandara's testimony acknowledging the lack of aggression or threat in Ramirez's conduct—thereby negating any intent to provoke a fight—and the fact, as his expert testified, that similar questions frequently do not result in violence.

Ramirez's first point—his subjective intent in hitting up Gilbert and Gandara—is irrelevant. Evaluating the mental state required to support a charge under section 415, subdivision (1), the Sixth District concluded specific intent to provoke a fight was not required to establish culpability under the statute. (*In re Cesar V.* (2011) 192 Cal.App.4th 989, 998-999.) In *In re Cesar V.* a police officer saw two teens making gang signs from the side of a busy street. The officer testified he could not tell if the hand signs were directed at a car or someone across the street but saw the gestures becoming more aggressive as if inviting a violent response. (*Id.* at pp. 991-992.) The officer stopped the teens, who claimed they had been responding to disrespectful signs thrown by a passenger in a passing car. (*Id.* at pp. 992-993.) Citing the testimony of the officer and a gang expert's opinion the teens' actions constituted a gang challenge for which violence was a common response, the court affirmed their convictions for disturbing the peace in violation of section 415, subdivision (1). (*Cesar V.*, at p. 999.) As the court explained, "A *challenge* to fight is prohibited because such a challenge may provoke a violent response that endangers not only the challenger but any other persons who may be in the public place where the challenge

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with a contrary finding does not warrant the judgment's reversal.'" (*People v. Clark* (2016) 63 Cal.4th 522, 626; accord, *People v. Ghobrial* (2018) 5 Cal.5th 250, 277.)

occurs. Because the statute is aimed at the inherent danger that a challenge will result in violence, it is irrelevant whether the challenger intended to actually cause a fight. The mere fact that the challenger may naively believe that his challenge will go unanswered does not reduce the danger that the challenge poses to both the challenger and the public. Since the danger that a challenge to fight creates, and that the Legislature intended to prohibit, is unaffected by the challenger's subjective intent to actually cause a fight or his subjective belief that a fight will not occur or is unlikely to occur, no specific intent is required. If a person challenges another person to fight in a public place, he or she violates Penal Code section 415, subdivision (1)." (*Id.* at pp. 998-999, fns. omitted.) Under *In re Cesar V.*, based on Detective Boisvert's testimony that the question "Where are you from?" initiated a challenge to fight, the jury could reasonably conclude Ramirez committed a violation of section 415, subdivision (1).

Ramirez's second argument—that violence was a possible but not probable result of his conduct—is a thinly disguised invitation to reweigh the evidence, an invitation we decline. To be sure, we have found no case in which the question "Where are you from?," standing alone or paired with an explicit gang identification and belligerent staring—Ramirez's actions—has been deemed sufficient to support liability for serious nontarget offenses under the natural and probable consequences doctrine. Typically, cases involving such challenges provoke an immediate fight that results in the more serious offenses of murder or attempted murder, allowing the prosecutor to allege assault as the target offense. (See, e.g., *Medina, supra,* 46 Cal.4th at pp. 920-921 [verbal challenge followed by a fistfight; nontarget offenses of

murder and attempted murder were natural and probable consequences of target offense of assault]; *People v. Hoang* (2006) 145 Cal.App.4th 264, 271-272 [stabbing was natural and probable consequence of aider and abettor's summoning of gang members and inciting them to assault victim]; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 10-11 [fatal shooting during gang-related fistfight was natural and probable consequence of fistfight]; *People v. Montes* (1999) 74 Cal.App.4th 1050, 1055 (*Montes*) [shooting of rival gang member during retreat after a fight was natural and probable consequence of gang fight instigated by gang challenge]; cf. *Smith*, *supra*, 60 Cal.4th at p. 612 [murders were natural and probable consequence of defendant's participation in "jump out" by two rival gangs; defendant committed the target offenses of assault and disturbing the peace]; see also *Prettyman, supra,* 14 Cal.4th at pp. 262-263 [describing range of cases applying natural and probable consequences doctrine].)[13]

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[13] Ramirez argues the trial court here should have followed the approach of the trial court in *People v. Hoang*, *supra,* 145 Cal.App.4th 264, in which the defendant incited a gang assault on the victim that resulted in the victim's stabbing. The trial court refused to allow the prosecutor to proceed under the theory the attempted murder was the natural and probable consequence of disturbing the peace and instead directed the prosecutor to proceed on the theory the attempted murder was a natural and probable consequence of the target offense of assault with a deadly weapon. (*Id.* at pp. 271-272.) The court of appeal affirmed the right of the trial court to direct the prosecutor to change the target offense (*id.* at pp. 273-274), but did not address whether disturbing the peace was an appropriate target offense, the issue before us.

Despite this lack of direct authority, the Supreme Court's broad language in *Medina, supra*, 46 Cal.4th 913 compels our rejection of Ramirez's argument. In *Medina* three gang members attending a party in Lakewood hit up another gang member, Barba, who had stopped by the house to deliver something to the homeowner, by asking, "'Where are you from?'" Viewing Barba's claim of his own gang affiliation as disrespectful, one of the three punched Barba, and the other two (including Medina) joined in the fight. (*Id.* at p. 917.) Though outnumbered, Barba held his own against his assailants. Eventually, the owner of the home managed to pull Barba away and escorted him and his girlfriend to their car, advising them to leave. (*Ibid.*) Although the fight was over, someone yelled, "'get the heat.'" (*Ibid.*) As Barba drove off, Medina stepped into the middle of the street and fired a gun repeatedly at Barba's car. Barba died of a gunshot wound to the head. (*Ibid.*) The jury convicted Medina of murder and attempted murder as the perpetrator and convicted the two other gang members of murder and attempted murder as aiders and abettors. (*Id.* at pp. 916, 917, 919.) The court of appeal reversed the convictions of the aiders and abettors on the ground there was insufficient evidence the nontarget crimes of murder and attempted murder were reasonably foreseeable consequences of the target offense of simple assault. (*Id.* at p. 919.) On review the Supreme Court rejected the decision of the court of appeal and affirmed the convictions in a closely divided decision. (*Id.* at pp. 916, 928.)

The *Medina* majority observed that a gang member's question "'where are you from?'" must be understood as "'what gang are you from?'" and is "a verbal challenge, which (depending on the response) could lead to a physical altercation and even

death." (*Medina, supra,* 46 Cal.4th at p. 922.) When attacked for showing disrespect, Barba exhibited strength against the three aggressors, who were thus prevented from avenging themselves. (*Ibid.*) The Court concluded, "[T]he jury could reasonably have found that a person in defendants' position ([that is], a gang member) would have or should have known that retaliation was likely to occur and that escalation of the confrontation to a deadly level was reasonably foreseeable as Barba was retreating from the scene." (*Id.* at pp. 922-923.) According to the majority, it was not necessary for the assailants to have used weapons during the fistfight, for the gangs involved to have been rivals or for the aiders and abettors to have known that Medina was armed. (*Id.* at pp. 922-924, 927.)

Responding to Justice Moreno's dissenting opinion (joined by Justices Kennard and Werdegar), Justice Chin writing for the Court dismissed the distinction made here by Ramirez between possible and probable consequences, stating, "the ultimate factual question is one of reasonable foreseeability, to be evaluated under *all* the factual circumstances of the case. [Citations.] The precise consequence need not have been foreseen." (*Medina, supra,* 46 Cal.4th at pp. 926-927.) The doctrine applied because it was foreseeable "the verbal confrontation . . . would likely escalate into some type of physical violence." (*Id.* at p. 927; see *People v. Lara* (2017) 9 Cal.App.5th 296, 315 [""[A]lthough variations in phrasing are found in decisions addressing the doctrine—'probable and natural,' 'natural and reasonable,' and 'reasonably foreseeable'—the ultimate factual question is one of foreseeability." . . . But "to be reasonably foreseeable '[t]he consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is

enough . . . .' [Citation.]" [Citation.] A reasonably foreseeable consequence is to be evaluated under all the factual circumstances of the individual case [citation] and is a factual issue to be resolved by the jury.'"].)

c. *The jury could reasonably conclude Ramirez did not act alone in committing the target offense*

As discussed, the jury was instructed that to find Ramirez guilty of aiding and abetting the charged offenses it had to first decide whether he was guilty of the target offense (disturbing the peace) and find that "[d]uring the commission of disturbing the peace a coparticipant in that disturbing the peace committed the crime of attempted murder and/or assault with a firearm and/or shooting at an inhabited dwelling." (CALCRIM No. 403.) A "*coparticipant*" was defined to include "anyone who aided and abetted the perpetrator." (*Ibid.*) Ramirez does not question the accuracy of the court's instruction but contends, even assuming he challenged Gilbert and Gandara to fight, according to the evidence he was the sole perpetrator of the target offense. That is, "there was insufficient evidence the shooter and his companion participated in any challenge to fight issued by [Ramirez]."[14]

Viewing the evidence in the light most favorable to the verdict, as we must, there is sufficient evidence to support the jury's conclusion Ramirez committed the crime of disturbing the peace as a coparticipant in a common plan with the shooter to start a fight. Ramirez first rode his bike by Gilbert and Gandara,

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[14] As Ramirez explains in his opening brief, "Without the gunman and appellant co-perpetrating the challenge to fight, appellant cannot be convicted of an attempted murder and other crimes by the gunman as a natural and probable consequence of the challenge to fight."

evaluating them, before returning to the apartment complex where the other gang members awaited. He reemerged and hit up Gilbert and Gandara, asking "Where are you from?" before announcing his own affiliation with Lynwood Young Crowd. He then returned to the complex only to emerge again with the other gang members who commenced the assault. The jury could reasonably infer from Ramirez's actions, as well as the shooter's shouted gang slur, that Ramirez was acting at the instigation or with the encouragement of the shooter and his associates when he approached Gilbert and his friends the second time and attempted to provoke a fight and that he had thereafter identified Gilbert as a member of Grape Street Watts to his coparticipants, who proceeded to commit the nontarget offenses.

d. *The target crime was not too trivial to support the convictions on the charged crimes*

Ramirez also contends the People may not rely on the natural and probable consequences doctrine to obtain convictions for serious crimes, such as attempted murder and shooting at an inhabited dwelling, when the defendant has only committed a "trivial" misdemeanor, here, disturbing the peace. In advancing this argument Ramirez relies on language from *Montes*, *supra*, 74 Cal.App.4th 1050, in which the court of appeal affirmed the defendant's conviction for attempted murder during a gang fight that originated with a gang challenge and ended in a shooting. (*Id.* at p. 1053.) Reviewing *Prettyman*, *supra*, 14 Cal.4th 248 and its progeny, the *Montes* court first observed that "decisions applying [the natural and probable consequences doctrine] 'most commonly involved situations in which a defendant assisted or encouraged a confederate to commit an assault with a deadly weapon or with potentially deadly force, and the confederate not

only assaulted but also murdered the victim. In those instances, the courts generally had no difficulty in upholding a murder conviction, reasoning that the jury could reasonably conclude that the killing of the victim was a "natural and probable consequence" of the assault that the defendant aided and abetted.'" (*Montes*, at p. 1055.) Continuing, the court stated: "On the other hand, it is rarely, if ever, true that 'an aider and abettor can "become liable for the commission of a very serious crime" committed by the aider and abettor's confederate [where] "the target offense contemplated by his aiding and abetting [was] trivial."' [Citation.] 'Murder, for instance, is *not* the natural and probable consequence of trivial activities. To trigger application of the "natural and probable consequences" doctrine, there must be a close connection between the target crime aided and abetted and the offense actually committed.'" (*Ibid.*) The *Montes* court concluded the threats and initial fighting between the rival gangs in the case before it were not trivial in nature and were closely connected to the escalation of the fight by the gang member who pulled a gun, a "textbook example of how a gang confrontation can easily escalate from mere shouting and shoving to gunfire." (*Ibid.*)

The extended discussion in *Montes* clarifies that a gang challenge that precipitates a gang fight can be a nontrivial instigator of more serious crimes resulting from that fight. There simply is no per se rule that precludes use of the natural and probable consequences doctrine when the target offense is disturbing the peace through a gang challenge. The question in each case is whether substantial evidence supports the jury's findings.

Attempting to distinguish *Montes* on its facts, Ramirez argues the People failed to show the shooting here arose from

Ramirez's confrontation of Gilbert and Gandara, which did not immediately escalate into a fight. As we have explained, however, the jury had evidence before it to support its conclusion the gang challenge was issued by Ramirez as a coparticipant in a common plan to start a fight, which led to the attempted murder and aggravated assault by Ramirez's confederates.

e. *Under People v. Favor the People were not required to prove premeditation by the shooter was a reasonably foreseeable consequence of the target offense*

In *People v. Favor* (2012) 54 Cal.4th 868 the Supreme Court held, "Under the natural and probable consequences doctrine, there is no requirement that an aider and abettor reasonably foresee an attempted premeditated murder as the natural and probable consequence of the target offense. It is sufficient that attempted murder is a reasonably foreseeable consequence of the crime aided and abetted, and the attempted murder itself was committed willfully, deliberately and with premeditation." (*Id*. at p. 880.) Two years later in *Chiu*, the Court held "the connection between the defendant's culpability and the perpetrator's premeditative state is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine." (*Chiu*, *supra*, 59 Cal.4th at p. 166; see also *People v. Rivera* (2015) 234 Cal.App.4th 1350 [*Chiu* analysis applies to a conviction for murder based on the natural and probable consequence of a conspiracy].) Nonetheless, the Court did not question the continued viability of *Favor*, and instead simply distinguished it. (*Chiu*, at p. 163.)

Ramirez contends we should extend the ruling in *Chiu* to convictions for attempted murder under the natural and probable consequences doctrine. We decline this request, as we remain

bound by the holding in *Favor*. (*People v. Johnson* (2012) 53 Cal.4th 519, 527-528.)[15]

Ramirez also argues *Favor* violates the rule established in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435], as extended in *Alleyne v. United States* (2013) 570 U.S. 99 [133 S.Ct. 2151, 186 L.Ed.2d 314], that every fact that increases a defendant's punishment must be determined by the jury beyond a reasonable doubt. Under *Favor* the premeditation finding, which is based on the mens rea of the direct perpetrator and results in an enhanced punishment, is determined by the jury after it decides the nontarget offense of attempted murder was foreseeable. (*Favor, supra,* 54 Cal.4th at pp. 879-880.) The jury was so instructed in this case and found the shooter had acted with the requisite intent and premeditation. Again, we decline to revisit this aspect of *Favor*.

3. *The Criminal Street Gang Enhancement Was Properly Imposed*

Section 186.22, subdivision (b)(1), provides for a sentence enhancement for any person convicted of a felony that was committed for the benefit of, at the direction of, or in association with any criminal street gang with the specific intent to promote,

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[15] As discussed, in granting review in *People v. Mateo*, S232674, *supra*, the Supreme Court had indicated its intention to reconsider the continued viability of *Favor* in light of its decision in *Chiu* and the United States Supreme Court's decision in *Alleyne v. United States* (2013) 570 U.S. 99 [133 S.Ct. 2151, 186 L.Ed.2d 314]. However, the Court transferred *Mateo* to the court of appeal in March 2019 with instructions to vacate its prior opinion and consider the effect, if any, of SB 1437 on the case. *Favor* thus remains binding authority.

further or assist in any criminal conduct by gang members. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1170; see *People v. Albillar* (2010) 51 Cal.4th 47, 60 (*Albillar*) ["the Legislature included the requirement that the crime to be enhanced be committed for the benefit of, at the direction of, or in association with a criminal street gang to make it 'clear that a criminal offense is subject to increased punishment under the [gang enhancement statute] only if the crime is "gang related"'"].) A "criminal street gang" is defined as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of [certain enumerated] criminal acts[,] . . . having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).) A "pattern of criminal gang activity" means "the commission of . . . or conviction of two or more [certain enumerated offenses]" that "were committed on separate occasions, or by two or more persons." (§ 186.22, subd. (e).)

Ramirez attacks the jury's true finding on the criminal street gang enhancement on two grounds: First, he claims Detective Boisvert's opinion identifying the pattern of gang activity by Lynwood Young Crowd was based on inadmissible testimonial hearsay. Second, he contends there was insufficient evidence to support the jury's gang-benefit finding. Neither claim has merit.

a. *Detective Boisvert's testimony on the pattern of gang activity was admissible*

"In order to prove the elements of the criminal street gang enhancement, the prosecution may, as in this case, present expert

testimony on criminal street gangs." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047-1048.) At the time of Ramirez's trial Supreme Court authority conferred broad latitude on gang experts to rely upon statements by fellow officers and gang members in opining that the crime charged involved gang-related activity. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 611-613, 619; *People v. Stamps* (2016) 3 Cal.App.5th 988, 993.) Trial courts, in turn, possessed "broad discretion to determine whether particular facts to which an expert was prepared to testify were sufficiently 'reliable' to come before the jury." (*Stamps,* at p. 994, citing *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 753.)

The Supreme Court's decision in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), which considered the extent to which *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*) and California hearsay rules preclude an expert witness from relating case-specific hearsay in explaining the basis for an opinion, altered this deferential approach to expert testimony. (*Sanchez*, at p. 670.) *Sanchez* held, "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Id.* at p. 686.)

Ramirez misperceives the scope of *Sanchez* in arguing certain statements made by Detective Boisvert failed to conform to *Sanchez*'s guidelines.[16] As discussed, Detective Boisvert opined the charged crimes were committed for the benefit of Ramirez's gang, Lynwood Young Crowd. To prove the necessary pattern of criminal gang activity by Lynwood Young Crowd, the People introduced certified abstracts of judgment reflecting the separate murder convictions of Juan Diego Valencia and Gavino Cirilo Ramos who, Boisvert further opined, were members of the gang. In identifying the basis for the latter opinion, Boisvert stated he had participated in the investigation of Valencia's crime, had spoken with the pertinent gang officer and had conducted database research. Because Boisvert had not been personally involved with the Ramos investigation, he based his opinion of Ramos's gang affiliation on his conversation with the gang officer and his review of Ramos's tattoos.

Ramirez's contention Detective Boisvert's statements constituted inadmissible testimonial hearsay founders on the *Sanchez* Court's recognition of the still broad latitude gang experts have in formulating and discussing their opinions. As the

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[16] Trial in this case took place before the Supreme Court issued its decision in *Sanchez*. The Supreme Court has granted review in *People v. Perez* (review granted July 18, 2018, S248730) to decide whether a defendant who failed to object at trial before *Sanchez* was decided, as here, forfeits a claim of *Sanchez* error subsequently advanced on appeal. (See *People v. Mendez* (2019) 7 Cal.5th 680, 694.) We consider the merits of Ramirez's claim of error based on *Sanchez* in the interest of judicial economy. (See generally *People v. Welch* (1993) 5 Cal.4th 228, 237-238 [no forfeiture "where an objection would have been futile or wholly unsupported by substantive law then in existence"].)

Court explained, "[A]n expert has traditionally been precluded from relating *case-specific* facts about which the expert has no independent knowledge. Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez, supra,* 63 Cal.4th at p. 676.) However, the Court emphasized, "Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so. Because the jury must independently evaluate the probative value of an expert's testimony, Evidence Code section 802 properly allows an expert to relate generally the kind and source of the 'matter' upon which his opinion rests. . . . There is a distinction to be made between allowing an expert to describe the type or source of the matter relied upon as opposed to presenting, as fact, case-specific hearsay that does not otherwise fall under a statutory exception. [¶] What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Sanchez,* at pp. 685-686.)

Detective Boisvert's identification of Valencia and Ramos as Lynwood Young Crowd members falls within the scope of proper expert testimony as defined by *Sanchez*. Boisvert generally described the sources for his opinions, which, in Valencia's case, included his personal involvement, as well as conversations with the investigating gang officer and database research. Although not involved in the investigation of Ramos's case, Boisvert cited the same general sources, including his review of Ramos's gang-related tattoos, as the basis for that aspect of his opinion. (See *Sanchez, supra,* 63 Cal.4th at p. 677 [expert may testify that a particular tattoo is "a symbol adopted by a given street gang"; the

presence of the tattoo signifies the person belongs to the gang].) Boisvert offered no case-specific facts as true in support of his opinions. Thus, his testimony was well within the limitations established in *Sanchez*.

b. *Substantial evidence supported the jury's gang-benefit finding*

Detective Boisvert also testified the charged felonies were committed for the benefit of the Lynwood Young Crowd gang, an opinion Ramirez challenges as unsupported by the facts, especially in light of the lack of involvement of any other Lynwood Young Crowd gang member. This argument relies on a mistaken interpretation of the elements required for the gang enhancement to be found true.[17]

Contrary to Ramirez's contention, the People need not establish "that the defendant act[ed] with the specific intent to promote, further or assist a *gang*; the statute requires only the specific intent to promote, further, or assist criminal conduct by *gang members*." (*Albillar, supra,* 51 Cal.4th at p. 67; accord,

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[17] "'We review the sufficiency of the evidence to support an enhancement using the same standard we apply to a conviction.'" (*People v. Rivera* (2019) 7 Cal.5th 306, 331.) "[W]e review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Albillar, supra,* 51 Cal.4th at pp. 59-60.) We draw all reasonable inferences in favor of the verdict, and presume the existence of every fact the jury could reasonably deduce from the evidence that supports its findings. (*People v. Maciel* (2013) 57 Cal.4th 482, 515; *People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

People v. Pettie (2017) 16 Cal.App.5th 23, 50-51; *People v. Garcia* (2017) 9 Cal.App.5th 364, 379-380.) That this was a gang-related shooting is beyond cavil. While the shooter's gang identification is unknown, Ramirez, by claiming the territory ("This is Lynwood Young Crowd") and initiating the challenge to fight, branded the shooting as a crime committed *at a minimum* for Lynwood Young Crowd. That it may also have benefitted another gang is not relevant to the finding the crimes were committed for the benefit of members of Ramirez's gang. (Cf. *People v. Rios* (2013) 222 Cal.App.4th 542, 574 [reversing gang enhancement where defendant did not call out a gang name, display gang signs or otherwise state his gang affiliation]; *People v. Ochoa* (2009) 179 Cal.App.4th 650, 662 [reversing gang enhancement finding where defendant did not call out a gang name, display gang signs or bear gang tattoos to identify his gang affiliation].)

4. *The Prosecutor's Misstatement of the Evidence Was Rendered Harmless by the Trial Court*

"'"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury."'" (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1331-1332; accord, *People v. Rivera* (2019) 7 Cal.5th 306, 333-334.)

"'A defendant's conviction will not be reversed for prosecutorial misconduct' that violates state law, however, 'unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.'"

(*People v. Wallace* (2008) 44 Cal.4th 1032, 1070-1071; accord, *People v. Rivera*, *supra*, 7 Cal.5th at p. 334.) Bad faith on the prosecutor's part is not a prerequisite to finding prosecutorial misconduct under state law. (*People v. Hill* (1998) 17 Cal.4th 800, 821; accord, *People v. Lloyd* (2015) 236 Cal.App.4th 49, 61.) As the Supreme Court has explained, "'[T]he term prosecutorial "misconduct" is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.'" (*People v. Centeno* (2014) 60 Cal.4th 659, 666-667; accord, *Lloyd,* at p. 61.)

"'To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.'" (*People v. Gurule* (2002) 28 Cal.4th 557, 657; accord, *People v. Friend* (2009) 47 Cal.4th 1, 29.) In addressing such a claim, the arguments must be "read as a whole and in light of the evidence before the jury." (*People v. Morales* (2001) 25 Cal.4th 34, 47.) We review a trial court's ruling regarding prosecutorial misconduct for abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 213.)

Ramirez contends the judgment should be reversed because the trial court erred in denying his motion for mistrial after the prosecutor misstated in his closing argument that someone had yelled "Hey, fuck Fake Street!" when the shooter and Ramirez were standing together at the corner and that it could have been Ramirez. In fact, during his testimony Gandara corrected his preliminary hearing testimony and stated the shooter had yelled the slur while running down the street toward Gandara's apartment. The trial court denied the motion, which was made

outside the jury's presence after the conclusion of the People's initial closing argument, noting it had already instructed the jury that counsel's arguments were not evidence. The court also stated Ramirez's counsel was free to discuss the clarification of Gandara's testimony in his closing argument and to tell the jury the prosecutor had misstated the evidence.

The court also offered to again admonish the jury; Ramirez's counsel accepted the offer. Back in the jury's presence, the court stated: "[B]efore [Ramirez's counsel] begins his closing argument, there was an issue regarding [the prosecutor's] closing argument regarding the evidence of what Joe Gandara . . . testified . . . as to when the person, the shooter, said "Fuck Fake Street. . . . So when you hear [counsel's] arguments, . . . they are just arguments. As part of the instructions that I gave you I told you what they say is not evidence. . . . These are their arguments as to how you should look at the facts and the evidence in relation to the law; however, it is your recollection, your memory, the court reporter's record, the exhibits, that is the evidence that you shall base [the verdict] on. . . . So [Ramirez's counsel] will be addressing that, but just keep that in mind. If . . . you feel that your memory of what the evidence is conflicts with what they're saying, you are the judges of the facts and you are to determine what is true or not." After this admonition Ramirez's counsel commenced his closing argument and specifically addressed the discrepancy in the evidence and the prosecutor's misstatement of that evidence and reminded the jury they could ask for the pertinent testimony to be read to them. In his rebuttal argument the prosecutor acknowledged his error and stated he in "no way" intended to mislead the jury.

Because of these interchanges, the jurors were properly advised of the prosecutor's unintentional misstatement of the facts, the inconsistencies in Gandara's preliminary hearing and trial testimony and their own obligation to decide the case based on the evidence and not the arguments of counsel. The trial court, therefore, ensured Ramirez suffered no harm because of any misstatements by the prosecutor during closing argument. (See *People v. Martinez* (2010) 47 Cal.4th 911, 957 ["[e]ven if the prosecutor's argument could be interpreted as . . . improper . . . , it is not reasonably probable that the verdict would have been more favorable to defendant without the misconduct"].)

5. *Remand Is Warranted To Permit the Trial Court To Consider Whether To Exercise Its New Sentencing Discretion*

While Ramirez's case has been pending on appeal, the Legislature passed, and the Governor signed, SB 620 and SB 1393, which amended provisions of the Penal Code to give the trial court discretion to strike or dismiss formerly mandatory firearm-use enhancements set forth in sections 12022.5 and 12022.53 and the formerly mandatory prior serious felony enhancement in section 667, subdivision (a). Both pieces of ameliorative legislation apply to defendants like Ramirez whose sentences were not yet final when they came into effect. (*People v. Zamora* (2019) 35 Cal.App.5th 200, 207-208 [both SB 620 and SB 1393 apply retroactively to defendants whose sentences were not final when the legislation became effective]; *People v. Franks* (2019) 35 Cal.App.5th 883, 892 [SB 1393]; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1089-1091 [SB 620].)

Given Ramirez's convictions for serious nontarget offenses based on his participation in the uncharged target offense of

disturbing the peace, remand is appropriate to allow the trial court to determine whether to exercise its newly granted discretion with respect to the 20-year firearm-use enhancements imposed on counts 1, 2 and 5 pursuant to section 12022.53, subdivisions (c) and (e)(1), and the five-year prior serious felony enhancement imposed on count 1 pursuant to section 667, subdivision (a). (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 ["a remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement"]; *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081.)

If the court elects not to impose the firearm-use enhancements, it must also decide whether to impose or strike under section 186.22, subdivision (g), the criminal street gang enhancements found true by the jury that could not previously be imposed under section 12022.53, subdivision (e)(2), which prohibits including both a criminal street gang enhancement and a firearm-use enhancement pursuant to section 12022.53 in a sentence unless the defendant personally used the firearm in the commission of the offense. (See *People v. Brookfield* (2009) 47 Cal.4th 583, 594.)

Finally, in resentencing Ramirez the court must impose or strike, rather than stay, the one-year enhancement for a prior separate prison term under section 667.5, subdivision (b). (*People v. Langston* (2004) 33 Cal.4th 1237, 1241 ["[t]he trial court may not stay the one-year enhancement, which is mandatory unless stricken"]; *People v. Lua* (2017) 10 Cal.App.5th 1004, 1020.)

DISPOSITION

Ramirez's convictions are affirmed. The sentence is vacated, and the matter remanded for the trial court to consider whether to exercise its discretion with respect to striking or dismissing the firearm-use and prior serious felony enhancements previously imposed and to conduct further sentencing proceedings not inconsistent with this opinion.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.